

DMP decision - failure to consider reasonableness and practicality of suggestions: failure to justify assertions.

RAS/1/LM

Commissioner's File: CA/735/91

DSS File: SD450/5590

SOCIAL SECURITY ACTS 1975 TO 1990

APPEAL FROM DECISION ON REVIEW OF ATTENDANCE ALLOWANCE BOARD ON A QUESTION OF LAW

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: Gary Antonio Rodriguez

[ORAL HEARING]

1. My decision is that the determination on review of the Attendance Allowance Board by their delegated medical practitioner (DMP) dated 5 March 1991 is erroneous in law and I accordingly allow this appeal. The case is now referred for second tier adjudication pursuant to regulation 23(2)(b) of the Social Security (Introduction of Disability Living Allowance) Regulations 1991.

2. The claimant is confined to a wheelchair and, it goes without saying, is unable to do various things for himself. He was in receipt of an attendance allowance, at the lower rate, on the basis that he satisfied the day attention condition, from 28 June 1989 to 27 June 1990. His renewal claim however was unsuccessful as was his request for a review. He now appeals to the Commissioner. His request for an oral hearing of his appeal was granted. At the hearing he was very ably represented by Mrs S. Figges of Oxfordshire Welfare Rights. The Secretary of State was represented by Mr L. Scoon of the Solicitor's Office, Departments of Health and Social Security.

3. In paragraph 3 of his determination the DMP said -

"3. The medical report dated 13 April 1990 indicates that you need help to wash the lower part of your body but you can manage the upper parts. I note also that it is shown you require help to get up from your chair and get into and out of bed. However, it is recorded that the chair is too slow and similarly, now that you are living with friends, you have to sleep on a low sofa. I cannot take into account the lack of proper sleeping and sitting facilities when making my decision and I am satisfied that with a suitably high bed and chair of the right height, you could manage to get into and out of bed and rise from the chair and transfer to your wheelchair, without help from another person. You are unable to walk or negotiate stairs and are confined to your wheelchair. With regard to your toileting abilities, you can manage your catheterisation 4 times a day but I

accept that if you need a bowel movement, as you cannot reach the upstairs toilet, you will have to use a receptacle in a downstairs room. This receptacle will have to be emptied but, as you are not incontinent of bowel, I would not expect the need for such attention to be required frequently in the day. You manage the rest of the functions independently."

Mrs Figges submitted and Mr Scoon agreed that that paragraph showed that the DMP did not sufficiently consider the reasonableness and practicality of his suggestions. In CA/168/1987 the Commissioner said -

"7. As regards the daytime, I shall first consider the decision of the DMP on the question whether the claimant was so severely physically disabled that she required from another person frequent attention throughout the day in connection with her bodily functions. As to this, the claimant could look after herself satisfactorily once she reached the toilet. She needed no help, for example, with her clothes or in getting on and off the toilet. However, the toilet in her house was upstairs and she required assistance to get upstairs to the toilet. The DMP said that he took the view that the provision of a commode downstairs would obviate her need for supervision when negotiating stairs to get to the toilet. In his submission to me the adjudication officer refers in this connection to an unreported decision CA/281 where the Commissioner said:-

"The Board is well entitled to suggest practical means of overcoming a problem thought to involve a requirement of attention or supervision but capable of solution by other means... In my view they are entitled to rely on their own experience and commonsense and do not have to call for evidence before making a decision of this kind although cases may arise in which that is desirable."

In her letters of appeal the claimant has expressed strong reasons why she does not wish to use a commode downstairs. She prefers to get to the toilet with the aid of her son, struggling up the stairs as best she can. He waits outside the door of the toilet and then helps her downstairs again. The decision of the DMP in relation to the commode discloses, in my view an error of law in that some of the most relevant considerations relating to it have not been set out and may not have been considered at all. For example, was there sufficient space for a commode in the room in which the claimant would sit during the day? Was there sufficient privacy for her to use a commode? Above all, who would empty the commode after it had been used by the claimant? Obviously it would have to be emptied soon after use and it seems equally obvious that the claimant, who walked with considerable difficulty using a stick, would

not be able to empty the commode for herself. The need to empty the commode after use would, I consider, fall within the words, "frequent attention throughout the day in connection with her bodily functions". Emptying a commode, as well as doing any necessary disinfecting and cleaning-up, would be "in connection with her bodily functions". None of these matters were considered by the DMP and in failing to consider them he, in my view, erred in law."

Those considerations apply equally to this present case in relation to paragraph 3 of the DMP's determination and I agree with the representatives that the determination is erroneous in law for the reasons to which they referred.

4. There is another point. In paragraph 10 of his determination the DMP said

"Whilst it may be that your condition has remained the same, I am satisfied that you have rehabilitated, made adjustments to your mode of living so that you have grown more independent in the management of your condition and able to cope with your disability."

There seems however to have been no evidence before the DMP to justify his assertions in that sentence and no explanation is given. The determination is further erroneous in law on that account.

5. I allow this appeal for the reasons to which I have referred and, in accordance with the provisions referred to, the case must now go to what is called second tier adjudication. The adjudicating authority must deal with the case again in its entirety and should take account not only of the points in this decision but also of the several points made on behalf of the claimant in connection with this appeal in particular in the written submission on behalf of the claimant produced at the hearing (copy attached to this decision).

(Signed) R A Sanders  
Commissioner

Date: 29 June 1992

*Note: Claimant could manage his own  
catheter but had no access to toilet  
or wash basin to wash his hands  
before + after without help.*